

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JANICE KOLERSKI,
BENJAMIN C. HEATH, Individually and
as Co-Executors of the Estate of
Edward A. Heath, Deceased,

Plaintiffs,

Hon. Hugh B. Scott

06CV422S

Order

v.

UNITED STATES OF AMERICA,

Defendant.

Before the Court is defendant United States' motion to compel plaintiffs to provide initial disclosures, to answer its first set of interrogatories, and to respond to its first notice to produce (Docket No. 22). Defendant seeks executed authorizations to serve upon plaintiffs' medical providers (see id. Def. Atty. Aff. ¶ 6). Defendant alternatively seeks an Order of preclusion pursuant to Federal Rule of Civil Procedure 37.

The briefing schedule for this motion gave plaintiffs until May 4, 2007, in which to respond to this motion, and defendant until May 18 2007, to reply, with the motion deemed submitted (without oral argument) on May 18, 2007 (Docket No. 23). Plaintiffs, however, did not respond to this motion¹.

¹Previously, defendant moved for leave to amend its Answer to the Amended Complaint, Docket No. 15, and plaintiffs did not respond to this motion. This Court, noting that omission, granted defendant's motion, Docket No. 19, Order at 1.

Federal Rule of Civil Procedure 37(a) allows a party to apply to the Court for an order compelling discovery, with that motion including a certification that the movant in good faith conferred or attempted to confer with the party not making the disclosure to secure that disclosure without court intervention. Fed. R. Civ. P. 37(a)(2)(A). Procedurally, under Rule 37(a)(2)(B) and this Court's Local Civil Rule 37, the movant needs to make a statement of good faith efforts made to resolve a discovery dispute before making motions to compel.

Under Rule 37(a)(4), if the motion to compel is granted, the Court

“shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, . . . , unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery or disclosure without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.”

Fed. R. Civ. P. 37(a)(4) (emphasis added).

Defendant here has shown its good faith efforts to resolve these discovery matters short of motion practice (see Docket No. 22, Def. Atty. Aff. ¶¶ 7-11, Exs. D, E, F). Therefore, defendant's motion to compel is **granted**. Plaintiffs shall forthwith serve the requested discovery and disclosure and furnish to defendant executed authorizations.

So Ordered.

/s/ Hugh B. Scott
Honorable Hugh B. Scott
United States Magistrate Judge

Dated: Buffalo, New York
May 16, 2007